

tion, unless there is provision to the contrary, as in section 47, which however expressly excludes promissory notes. The modes of stamping are set out in subsections (3) and (4) of section 7. Instruments appearing in the 1st schedule and not included in the 2nd schedule shall be taken to the Stamp Office for cancellation and instruments included in the second schedule may be similarly cancelled at the Stamp Office or cancelled in the following manner:

"Whoever affixes any such stamp... shall, at the time of execution, ... cancel the same in manner aforesaid so that it cannot be used again."

As promissory notes appear in the first schedule and are not included in the second schedule and are not of the class permitted by section 47 to be stamped after execution, it is clear that their validity would hinge upon their being stamped *before* execution. Instruments set out in the Second Schedule can clearly be stamped "at the time of execution" by cancellation of the postage stamp. Section 41 can be so construed that effect can be given to every word therein. *Surij Mull* was not followed and was expressly dissented from in the case of *Rohini*, to which reference had earlier been made, and I quote:

"Mr. Kapadia strongly relied on a judgment of the Madras High Court in — '*Surij Mull v. Hudson*', 24 Mad. 259(A). In that case the executant was only one and the promissory note was signed by him and subsequently it was stamped, and the question was whether the provisions of section 17 had been complied with, and the Madras High Court held that the uncontradicted evidence of the plaintiff shows that the acts were practically simultaneous and the stamping was therefore done at the time of execution within the meaning of section 16 which corresponded to section 17 of the present Act.

With very great respect to the Madras High Court, it is difficult to understand the significance of the expression 'practically simultaneous'. Either the stamping is after execution or it is before or at the time of execution. If the stamping is after execution, then clearly the case does not fall within section 17."

I would now refer to the two cases just mentioned. In *Surij Mull*, the facts were:

"...The evidence of the plaintiff's brother and agent was as follows:- 'I saw defendant execute this promissory note (dated 1st February 1897) interest at 2 per cent. per mensem. After the promissory note was executed the stamp was affixed and cancelled by the defendant before it was delivered.' ...From the findings of the Appellate Court, it appears... that the stamp had been affixed and cancelled after the execution of the note, though the signing and stamping had been practically simultaneous;... Moreover, the note was not stamped as required at the time of execution but afterwards."

In *Rohini's* case,

"the promissory note bears the signature of both the defendants, but it is admitted by the plaintiff that when defendants 1 and 2 signed the promissory note it did not bear the requisite stamps and the requisite stamps were affixed subsequently and they were cancelled by defendant 1."

The Indian Stamp Act permits use of adhesive stamps for promissory notes, so there can be no good reason for extending "at the time of execution" to include a reasonable time after execution. In our case, as the Chief Justice said, so far as promissory notes are concerned, there can be no doubt that its validity would depend upon its being duly stamped, that is, before execution.

The obiter dictum of Lord Somervell in *M. Takim & Co. v. Velji*,⁽⁴⁾ though persuasive, cannot be binding

A on our courts. The identical phrase to our section 41 in the Zanzibar Stamp Decree was construed in a different context and did not concern promissory notes.

I would follow *Rohini's* case where Chagla C.J. has given his reason for dissenting from *Surij Mull's* case.

B I would allow the appeal with costs here and on appeal to the High Court and restore the judgment of the president, Sessions Court, dismissing the claim with costs.

Appeal allowed.

Solicitors: *Thevin, Chandran & Siva; Chor Pee & Hin Hiong.*

MUNIANDY & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Ong C. J., Gill and Ong Hock Sim F.JJ.)

February 12, 1973]

[Kuala Lumpur — Federal Court Criminal Appeal

No. 2 of 1972]

E *Penal Code, s. 375 — Rape — Child-complainant — Need for corroboration — Circumstantial evidence — Defence case not properly and fairly presented to jury — Summing-up — Misdirection — Evidence Ordinance, 1950, s. 132 and 154 — Self-incriminating evidence — Need to warn witness.*

F This was an appeal against the conviction of the appellant on a charge of rape. The prosecution rested mainly and solely on the evidence of the child-complainant. There was no corroboration of her evidence. A witness was called for the defence and asked whether he had sexual intercourse with the complainant but the provisions of section 132(2) of the Evidence Ordinance was not explained to the witness.

Held: (1) the complainant's evidence by itself was far from convincing and there was a total absence of corroboration in any material particular implicating either of the appellants. On the contrary the complainant's evidence was discredited by her own father;

(2) the defence case was not properly and fairly presented to the jury;

G (3) the failure of the learned judge to comply with the provisions of section 132 of the Evidence Ordinance resulted in serious misdirections;

(4) on all these grounds, the appeal must be allowed and the conviction of the appellants quashed.

Cases referred to:-

H (1) *R. v. Baskerville* [1916] 2 K.B. 658, 663.
(2) *R. v. Hester* [1972] 3 W.L.R. 910, 932.

FEDERAL COURT.

P. Devadas for the appellants.

Mohammad Adnan bin Datuk Shuib (Deputy Public Prosecutor) for the respondent.

I **Ong C.J.:** The appellants were tried in the High Court at Malacca before a jury on a charge of rape allegedly committed on April 18, 1971 by the first appellant, with the abetment of the second appellant, on a girl about 12 years of age. The jury by a majority of 6 to 1 returned a verdict of guilty and the appellants were sentenced on November 13, 1972 to imprisonment for 5 years and 4 years respectively. They

both appealed against such conviction and sentence. Their appeal was by an unanimous decision of this court allowed on February 12, 1973 and the conviction and sentence quashed. We now state the grounds of our decision.

The prosecution case rested mainly and solely on the evidence of the child-complainant who was born on May 26, 1959. She is the third eldest child of a 41-year-old rubber tapper, formerly a special constable for 2 or 3 years, who has a wife and 9 other children. The first appellant was a 53-year-old sweeper, then employed in the same rubber estate, having a wife and 4 children, living 6 doors away from the complainant's family in the same block of labourers' quarters; he had had a long medical history of suffering from hypertension. The second appellant was a next-door neighbour, 17 years old at the time of the alleged offence and unmarried.

The complainant's evidence was that, with her parents and 7 other brothers and sisters, she was watching a TV programme in a shop situate at an adjoining block, from about 8 p.m. until 9 p.m. when she was called home to put an infant brother to sleep. Having done so she proceeded to the common lavatory about 110 yards behind the labour lines. On her way there she was stopped by the first appellant coming up from behind, who shut her mouth with his hand. Then he called for assistance from the second appellant and together they carried her to the lavatory, where the first appellant, threatening to kill her if she shouted, proceeded forcibly to strip her naked outside the lavatory door. Both appellants then dragged her head-first into the lavatory cubicle (which measured 2' 7" by 3") so that, whilst her head was inside and pressed against the cement floor, her body was outside the door. In this position the first appellant was about to rape her when her father was heard calling out her name. Although clearly in danger of discovery she said they did not try to escape. Instead, they then carried her bodily into the lavatory stark naked and whilst she and the first appellant were standing pressed against the left corner of this little cubicle the second appellant pretended to be easing himself squatted over the hole. Her evidence-in-chief continued as follows:—

"Then my father pulled the door of the lavatory. *The door opened a little. My father shone the light inside. ... The light fell on all the three of us.* Then the light went off again the second time. My father just pulled the door and shone the light in but my mother was calling out my name. At that time my father did not say anything. When my father shone in the light neither of the accused said anything."

After the father left, the appellants again put her in the same position, with her head inside the lavatory and her body outside. Then the rape proceeded to completion. After the event the two men carried her to a clump of banana trees nearby, dropped her there and departed. She got up, still naked, "*found her clothing in front of the lavatory just near the door*", dressed herself and went home where her mother was waiting. She made no complaint to her parents of the attack which, if true, would be naturally expected of her. Instead, when asked where she had been, she evaded an honest reply and gave the false excuse that she had been to the lavatory. To adorn this falsehood with an

A appearance of truth she went into the bathroom "because", in her own words, "I had not put on my bra and my panties and also *because I told my mother that I had been to the lavatory*". There she washed her anus "because I told my mother that I went to the lavatory". She continued:—

B "At that time I found some slimy substance *over* my private part. I did not wash it away, but I just put on my panties". It may be observed that this substance was not found inside her vagina. The reason why she did not wash off the slimy substance, she later explained, was that she wanted to ask her mother about it the next day. To account for so waiting in silence she explained that, had she told her mother that night, her father would come to know about it "and then there would be trouble as he is a hot-headed person".

C On emerging from the bathroom she was interrogated by her father and asked where she had been, but still she made no reply or report of the alleged rape — the alleged reason for her silence being fear of a threat uttered by the first appellant that, if she reported the incident to her parents, this appellant would murder her and her father that same night. Thus she had given two reasons for not telling the truth — concern for her seducer and concern for her father's safety.

When she awoke the next morning, both her parents had started the day's work at dawn, but when she saw her father later at about 8 a.m. and he again questioned her as to her whereabouts the night before, she asked him to bring her mother back from her tapping task and on the latter being fetched home, she related her story to her and the mother conveyed it to her father. It was not a little strange that an innocent girl, victim of an outrage, should have felt the need of her mother's protection from the wrath of her father. If her story were true, would any person, let alone her own father, have punished her for her misfortune? On the night of the incident, she went on to say in cross-examination, her father had asked her repeatedly where she had been, but she did not reply. When it was put to her that her injuries came from a thrashing by her irate father, she said he did not even scold her, much less administer punishment for refusing to answer.

G In cross-examination the following particulars came to light from her answers: that after the departure of the appellants, *she had wanted to shout out for help*, but did not; and just because she had heard her elder sister's voice, she picked up her clothing, put them on and quietly returned home and she did not report to her father from fear of his temper. More significant were her self-contradictions. In the first place she stated that, while they were all inside the lavatory, her clothings were also *inside* the lavatory, but on re-examination, she made a different statement of fact in these words: "I knew my clothings were *not inside* the lavatory when the three of us were inside, because I was taken in without my clothings and when I was held over the mouth I looked and my clothings were *not inside*". Most significant was her statement that she "*was thrown away in the bushes about a foot away to the right of the lavatory as one faces it*". As revealed by the photograph Ex.P.2B there could have been bushes within

at least 10 feet right of the lavatory, and together with photograph Ex.P.2F they show in detail the type of vegetation (*sans* bushes or shrubs which could have caused scratches and abrasions) all around the lavatories. The prosecution never asked, nor did she explain, how she sustained the abrasions noted on her leg and abdomen, whereas there were none on her back, which might be expected if she were lying on rough cement over the lavatory hole.

Such was the testimony of the complainant which, by itself and without any other material evidence implicating either of these two appellants, was the basis for their conviction. In *Rex v. Baskerville*⁽¹⁾ Lord Reading C.J., speaking of the rule of practice accepted "as virtually equivalent to a rule of law" requiring corroboration in this type of cases, said:—

"If after the proper caution by the judge the jury nevertheless convict the prisoners, this court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the jury would convict in such circumstances. In considering whether or not the conviction should stand, this court will review all the facts of the case, and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. *But this court, in the exercise of its powers, will quash a conviction even when the judge has given to the jury the warning or advice above mentioned if this court, after considering all the circumstances of the case, thinks the verdict unreasonable, or that it cannot be supported having regard to the evidence.*"

Let us now examine whether or not it is true to say that there was no corroboration whatsoever of the complainant's evidence implicating these appellants. It will be observed that the learned trial judge himself directed the jury that in this case the prosecution was "relying mainly on the evidence of the complainant and on circumstantial evidence".

Circumstantial evidence, as corroboration, is clearly valueless unless it is independent evidence which, in a material particular, not only supports the evidence requiring corroboration as proof that the alleged offence had been committed, *but also in a material particular implicating the accused*. It is plainly the bounden duty of a trial judge to ensure that evidence should not be misunderstood and passed off as corroboration when in fact and in law it is not, and that the distinction is fully understood by the jury. Although the jury are judges of fact, they are nevertheless entitled to look to the judge for assistance to marshal the facts in coherent form, pointing out matters in evidence which are relevant and material for and against each side. Laymen, without such assistance, can never be expected to sort out the grain from the chaff. The vital need for a summing-up to be carefully done is an exhortation which we must re-emphasise.

In the instant case two medical witnesses gave evidence. Dr. Chua Tiong Hong only gave the complainant an *external* examination of her body and general appearance. He found a superficial abrasion on the nape of her neck, a bruise on the left axilla, 2 linear abrasions on the right of her abdomen near the umbilicus and multiple superficial abrasions on her left leg from thigh to foot. All these injuries, in his opinion, *could have been caused by being struck with a leather belt* — which was the defence adumbrated. He examined the first appellant also on the same day —

A for potency. On a rough cement surface a rapist might be expected to have some slight abrasions on his elbow or forearm and also on his knees. Yet there was absolutely no trace of any such superficial injury found on this appellant. Hence this doctor's evidence could not by any stretch of imagination be considered as implicating the first appellant, or corroboration of the complainant's evidence. She herself bore no marks of injury on her bare back, as might have been expected to be found on one lying on a rough cement platform over the lavatory hole which was flanked by raised serrated footrests. This medical evidence, in short, was more consistent with the first appellant's innocence than guilt.

C The second medical witness was Dr. Mahadeva, who, it is plain, was looking for evidence of rape. Examination of the girl's *vulva and vagina revealed nothing abnormal in the form of abrasions or lacerations*. The hymen was lax, thinned out and could easily allow one finger examination. This type of hymen, he said, is invariably found in a congenital type born with lax and thinned out hymen — and the girl in his opinion belonged to this group. A single sexual intercourse would not thin out a hymen *per se*. *He could not rule out regular intercourse in this case*. Hence she was then in all probability not *virgo intacta* and the medical evidence itself, plus the absence of any injury to the vulva or vagina, again afforded no corroboration whatsoever of any sexual intercourse or even of penetration by any male organ as alleged by the complainant. One would have expected, as a matter of course, a vaginal swab to have been taken, as conclusive evidence of penetration. This was not done. Moreover penetration, even on the girl's evidence, was negatived because the seminal fluid was said by her to have been left *over her private parts*.

F The next material prosecution witness was the complainant's father. In the confined space of 2 feet 7 inches by 3 feet within the lavatory the girl said that the light from her father's torch *fell on all three of them within when he pulled the door open a little*. In his own evidence-in-chief, Sinniah said:—

G "The lavatory on the left had its door shut. I held this lavatory door and found it was tight. *So I pulled this door and it opened slightly. I shone the light in through this opening and I saw the face of the second accused.*"

In cross-examination, however, he contradicted himself thus:—

H "Before I opened the door of the lavatory there was a small opening on the left hand side of the door and *through this hole I saw the second accused inside*. I now say I only placed my hand on the door. I did not try to open the door."

Of this witness, it need only be said that, even if he were to be believed, in spite of this self-contradiction, he could not have failed to notice all three persons *on whom the light fell inside*; even again, in spite of everything, if it was true that he saw only the face of the second appellant, his evidence only proved the presence of that single appellant and afforded no corroboration of the complainant's evidence that all three were inside at the time.

Of still more significance was the acid test of truth. The girl said she was stripped naked outside the lavatory door, and she found the clothing there after—

wards; yet, during the intervening period, when the clothing should have been plainly visible, her father who had been using a electric torch (besides the bright moonlight he spoke of) failed to notice them at all. If he spoke the truth then the inevitable conclusion must be that the complainant was never stripped there, and the alleged rape committed at the lavatory was a story concocted by the girl to deceive her parents about her sexual experience with some other person elsewhere. The girl's failure to complain to her parents and the false excuse she gave lent strong support to this conclusion.

In what way, it may be asked, could the father's evidence be regarded as corroboration of the evidence of rape deposed to by the complainant? He did not see the first appellant, nor the complainant with him; the vital circumstantial evidence which would have clinched the prosecution case could have been given by him — the finding of the female clothing outside the door — but he saw none of it. The disparity of some 36 years between the ages of the appellants made it unaccountably strange why the youth should assist the older man for no plausible reason. If it was true, as she alleged, that the second appellant was choking her into silence, the absence of finger-marks forcibly applied on her throat was significantly in his favour.

Thus at the close of the prosecution, the complainant was the sole witness whose bare words alone incriminated the appellants. Apart from the absence of independent corroboration of her evidence in any material particular implicating the appellants, her evidence regarding her clothing was flatly contradicted by her father and thereby totally discredited. His evidence conclusively proved she was never in the lavatory as she alleged. She admitted falsely misleading them regarding her presence there.

One of the grounds of appeal was that the case should have been withdrawn from the jury at the close of the prosecution. After convincing proof that the complainant herself was far from truthful, we think that the jury should have been directed then to acquit. Be that as it may, it was all too clear that the learned trial judge himself must have taken the view that there was sufficient corroboration of the complainant's testimony by the medical evidence and that of her father. Otherwise he would not have called on the defence.

Both appellants gave evidence on oath denying the complainant's allegations *in toto*. They stated that they never went near the lavatory that night. The first appellant called one Ramasamy, a store labourer, who, he said, accompanied him homewards from the TV show at 9 p.m. Ramasamy, however, stated that he returned alone. Whether or not Ramasamy's recollection played him false, his evidence was of little significance. Proof of guilt rested on the prosecution, not the weakness of the defence. The next defence witness was Karuppiah, the estate mandore, who deposed that about 8.30 p.m. he was at home when he saw the complainant on his front doorstep, and that after an exchange of salutations he saw her going to the back lane behind his quarters, along which one could go towards a temple 3 to 4 chains away. It was relevant and material, having regard to the evidence

A of another witness, Chandran. This witness had not given evidence at the preliminary enquiry and had not gone out of curiosity to the magistrate's court to hear the evidence. After reading reports of that hearing, however, he told the first appellant that the complainant had been to his quarters on the night of the alleged rape, and that shortly after her parents had come inquiring of her whereabouts from him.

B Now it had been adumbrated in cross-examination of the complainant that she in fact had had sexual relations with another person that night elsewhere, and had Karuppiah's evidence not been summarily brushed aside by the learned trial judge, it was consistent with the defence and therefore, in order that the defence case should be fairly and properly presented to the jury, it would not do for the learned judge, in a few words, to dismiss the evidence of Karuppiah as irrelevant. "This witness" he told the jury, "you *must* bear in mind, did not give evidence at the preliminary enquiry. He is only giving evidence in the High Court". This witness had given a perfectly good reason why he had not given evidence at the preliminary enquiry.

After Karuppiah, the next defence witness was Chandran, a younger brother of the second appellant, who claimed to be a close friend for two years with another youth named Veerappan (Veeran for short). He said in evidence that Veeran had confidentially disclosed to him his having had sexual relations on previous occasions with the complainant and that on the night in question, *while going towards the temple*, he had seen Veeran and the girl disappear into the darkness of the rubber estate for half-an-hour. Karuppiah's evidence corroborated him on this lovers' meeting. Later that night he saw the complainant being given a thrashing by her father with his leather belt. Dr. Chua had said that a belt could have caused the injuries seen on the girl's body. After his brother's arrest, he went to the Tebong Police Station intending to tell the corporal that the second appellant had nothing to do with the offence alleged against him, and that it was Veeran who had been having sexual intercourse with the complainant.

G On the record of the trial there is this passage taken down while Chandran was giving evidence under cross-examination:—

"I know that any official complaints on visits by any person to the Police Station in Tebong are recorded in a book known as the Station Diary. Station Diary of Tebong Police Station of 19th April 1971 put in and marked P11. Entry No. 8932 and 8933 referred to witness. I agree that my complaint is not registered in this book. I cannot say if the entries in this book are lies."

H Of Chandran's visit to the police station the learned trial judge gave this direction to the jury:—

"The Corporal, you will recall, in cross-examination stated that he knew Chandran but denied that Chandran came to the police station and gave any information to him. We must also remember in this instance that Chandran did not give evidence at the Preliminary Enquiry."

I The Station Diary Entries proved beyond any dispute that, shortly after the arrest of the second appellant and on the very same day, Chandran did go, not once, but twice, into the police station on business — but it would appear that the corporal did not see fit to record

his statement. The entries proved the corporal was wrong in saying that "Chandran did not come to the police station on that day".

The learned trial judge, however, had forgotten, or chosen to reject, the evidence provided by these Station Diary Entries, which proved that Chandran in fact was telling the truth, whereas the corporal was suffering from a lapse of memory — self-saving no doubt, because he should have done his duty and recorded any report or statement, whether or not he believed it true or false. The jury were in effect directed to disregard Chandran's evidence. Had the judge fairly and properly presented the defence case, he should have pointed out to the jury what they would not have known — that witnesses called at a preliminary enquiry are only those summoned by the prosecution, that merely because Chandran had not given his deposition at the enquiry, that fact should not be considered as discrediting him *per se* and that it was for the jury themselves to attach to his evidence such weight as they thought fit, having regard to the rest of the evidence on both sides. In our view it is not incorrect or unfair towards the judge to say that he gave them the clearest instruction to reject Chandran's evidence as they also were directed to do regarding Karuppiyah. These adverse comments on Chandran and Karuppiyah should never have been made, since they were clearly tendentious and prejudicial towards the defence. Legal practitioners and judges who know the law of criminal procedure understand — but *not a jury of laymen* unless they are so informed — that the object of a preliminary enquiry is only to ascertain whether or not there is a *prima facie* case against an accused, in order that he may be committed for trial. At the conclusion of such enquiry, if the accused elects to reserve his defence, he is only required to submit orally or in writing the names and addresses of any person or persons whom he desires to be summoned to give evidence on his behalf at his trial. This he may also do at any time before his trial by informing the registrar: see sections 151 to 155 of the Criminal Procedure Code (S.S.) Cap. 21. Had these rules of procedure been borne in mind, they surely could not have been disregarded by directions which were manifestly unfair to belittle the evidence of defence witnesses, whose failure to attend and give evidence at a preliminary enquiry was due to no fault of their own.

The last defence witness was Veerappan (Veeran). Before defence counsel called him as a witness, it may safely be assumed, that as a matter of common practice, proofs of this witness must have been taken when he was interviewed. We are fortified in this assumption by the fact that when Veeran gave evidence, he admitted being in the company of Chandran on the evening in question, being on friendly terms with both appellants as well as the complainant's father and having known the complainant herself for some time. When asked the crucial question what took place on the night of April 18, however, he said nothing happened, but that he heard only the next day of the appellants' arrest on a charge of rape. Thereupon counsel for the second appellant asked leave of the court to cross-examine Veeran as a hostile witness, under section 154 of the Evidence Ordinance. As all lawyers must know, in order to treat one's own witness

A as hostile by cross-examining him, the only possible means is to confront the witness with his previous contradictory statement. Hence, there must have been some statement or admission by him of sexual familiarity at least on other occasions between the witness and the complainant, if not of sexual intercourse on the night in question.

B The learned trial judge dismissed this application, and of this witness the judge said this to the jury:—

"He denied telling Chandran that he had sexual intercourse with the complainant on that night or any other night."

C It is a shocking thing to say it, but counsel for the second appellant was asked by us whether, before making his application under section 154 of the Evidence Ordinance, he had not referred the learned trial judge to the provisions of section 132. How could any witness be expected to admit the commission by himself of a crime, unless he had been reassured by the judge that no harm would come to him from telling the truth, even if it incriminated himself?

D Counsel admitted to us his remissness, but, then, we considered it the plain duty of the learned trial judge to give this witness the necessary assurance, as laid down in section 132, which provides that a witness shall not be excused from answering any question as to any relevant matter in issue, on the ground that the answer to such question will incriminate him. Then sub-section (3) reads:—

E "Before compelling a witness to answer a question the answer to which will incriminate him ... the court shall explain to the witness the purport of sub-section (2)."

F In this case the learned trial judge knew the question put to the witness would certainly incriminate him, should his answer be in the affirmative, because the age of the complainant made her willing participation to sexual intercourse not an available defence. Therefore the judge ought to have given, but did not give the witness the explanation he was entitled to by law. Consequently his evidence was placed before the jury in a form so as to demolish the defence completely. On this point alone, if nothing more, the appeal must succeed.

G There are many matters of criticism both of the conduct of the prosecution and of the summing-up. But it is not necessary to pile Pelion on Ossa, except to refer to the following directions on *corroboration* which might be derived, as such, from *circumstantial evidence*:—

H "On a charge of rape I must remind you that it is highly dangerous to convict an accused person on the uncorroborated evidence of the prosecutrix. None the less, you may still convict the accused on the uncorroborated evidence of the prosecutrix provided you are convinced of the truth of her allegation. It is, however, a matter of prudence on a charge of rape to look for corroborative evidence of the prosecutrix. The corroboration may be direct evidence or by circumstantial evidence. Direct evidence is the evidence of an eye witness in respect of a happening and *circumstantial evidence means the evidence afforded not by the direct testimony of an eye witness to the facts to be proved but by the bearing upon that fact or other subsidiary facts which are relied upon as inconsistent with any result other than the truth of the principal fact*. It is like the pieces in a jigsaw puzzle. If the pieces fit in and form a picture, then only it is good evidence, but not otherwise."

I We feel sure that no member of the jury could possibly have understood the above definition or des-

cription of circumstantial evidence — which in this case was held out as supplying the necessary corroboration. We do not think the explanation was at all intelligible to the jury of laymen so that they could apply it properly. As Lord Diplock said in *Reg v. Hester*:⁽²⁾

"If a summing-up is to perform its proper function in a criminal trial by jury, it should not contain a general disquisition on the law of corroboration couched in lawyer's language, but should be tailored to the particular circumstances of the case."

Wherever circumstantial evidence is relied on by the prosecution in building up its case against an accused person, any such piece of evidence must tend only in one direction, that is to say, suggest or lend support to an inference of guilt. This evidence, if capable of an innocent interpretation — or ambiguous, as being equally consistent with guilt or innocence — should never be placed before the jury as circumstantial evidence strengthening the prosecution case. Any summing-up which fails to explain this intelligibly to the jury is a serious misdirection. All the more so, where, in the instant case, circumstantial evidence more consistent with innocence than guilt was represented to the jury as corroboration of the complainant's evidence. On the other hand, where the circumstantial evidence

A is seen to be strongly in favour of the defence, a proper trial requires that, in the interests of justice, this fact be brought to the notice of the jury and not passed over as an irrelevant detail. Had the jury in this case been directed that, from the father's failure to see the clothing where he could not have failed to notice it, they should draw their own conclusions as to whether complainant was telling the truth, there can be little doubt what the verdict would have been.

B To sum up, the complainant's evidence by itself was far from convincing; there was a total absence of corroboration in any material particular implicating either of the appellants; on the contrary, the complainant's evidence was plainly discredited by her own father on the acid test of truth; the defence case was never properly and fairly presented to the jury, and the failure by the judge to comply with the peremptory provisions of sub-section (3) of section 132 of the Evidence Ordinance resulted in serious misdirections — all these are the grounds why we had no hesitation in allowing this appeal. We accordingly quashed the conviction and sentence.

C

D

Appeal allowed.

Solicitors: *Devadas & Co.*